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FCC 05M-56

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In the Matter of

EB Docket No. 04-381

Complainants,

v.

Gulf Power Company,

Respondent.

Issued: November 17, 2005

Released: November 18, 2005

Telecommunications Association, Inc., *et. al.* (“Complainants”) filed a “Third Motion to Compel Production of Documents and Further Responses to Interrogatories for which the Presiding Judge Twice Required Supplemental Responses or, in the Alternative, for Evidentiary Rulings or Dismissal” on October 7, 2005. Gulf Power filed its Response on November 4, 2005, and Complainants filed its Reply on November 9, 2005. *See Order FCC 05M-52*, released October 26, 2005.¹

¹ Previous discovery rulings on Complainants' discovery are contained in *Discovery Order* FCC 05M-38, released August 5, 2005, and *Second Discovery Order* FCC 05M-44, released September 22, 2005.

Documents

Complainants remain dissatisfied with Gulf Power's supplemental responses to ten document requests in Complainants' second requests. Most of these requests concern "make ready" and "change out" documents.² (Requests Nos. 1, 2, 4, 5, 6, 7, 8, 12, 14 and 15.)

Gulf Power has made responsive documents available for inspection at a document review session conducted at the premises of Gulf Power on May 27-28, 2005. Complainants contend that such document availability was not sufficient under Rule 34 of the Federal rules of Civil Procedure ("FRCP"), because Gulf Power did not provide "identifying markers such as precise locations, offices, files, and, most importantly, specific document numbers or files." In a Motion filed by Gulf Power, on September 30, 2005, Gulf Power further described its document availability procedures, illustrating by examples with respect to make ready orders, which were "made available for inspection at various locations," an invitation that is continuing and which Complainants have not accepted.

For justification of compliance by document availability, Gulf Power relies on FRCP 34(b) which provides that "a responding party has no duty to label the documents if it has produced them as they are kept in the ordinary course of business." *See Hagemeyer N.America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D. Wis. 2004) (respondent party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business). *See also Doe v. District of Columbia*, 231 F.R.D. 27, 35 (D.C.C. 2005) (compliance found when respondent party produced documents as kept in usual course of business).

Gulf Power has continued to make responsive documents available in local Pensacola field offices, but it appears that Complainants have not availed themselves of locating requested documents as they are being tendered.³ Complainants continue to contend that Gulf Power's supplemental responses to the ten document requests are inadequate.

² "Make ready" work is: work, costs and expenses associated with affixing attachments to Gulf Power's poles. "Change outs" means replacement or substitution of a pole as part of a make ready procedure as requested by an attacher, by government entity, or necessitated by Gulf Power in providing electricity.

³ On August 4, 2005, Complainants were instructed to "inspect documents offered for inspection by Gulf Power, seek to negotiate narrowed request for further documents, and limit any Motion to Compel documents that are likely to be used in deposition and/or at hearing, and/or that are needed for testifying experts to formulate opinions." *Discovery Order, supra* at 21. There has been no representation that these instructions have been followed. Instead, Complainants continue to carry on a motions practice. Time would be best spent in agreeing to an efficient production of documents in prehearing discovery.

Request No. 1

Produce, and specify by Bates number, all documents referring to any instance, from 1998 through the present, in which Gulf Power was unable to accommodate additional attachments, either by third parties or by Gulf Power itself, on poles already containing Complainants' attachments.

Complainants continue requesting documents referencing instances in which Gulf Power was unable to accommodate any additional attachments, or "make ready work orders." Gulf Power argues that on May 27-28, it made all make ready work orders that apply to the relevant time available in Gulf Power offices, assembled as they were kept in the usual course of business, citing, *inter alia*, *Hagemeyer N. America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 598 (E.D. Wis. 2004) (documents kept in storage were kept in ordinary course of business and no duty to label existed). There are no affidavits or other evidence offered by Complainants to support their position that Gulf Power's production at its E/C offices made documents available for inspection that were not in accord with its "usual course of business."⁴

To facilitate production, Complainants were advised by Gulf Power of the manner in which individual cable companies can locate work orders that are categorized by name (e.g. Comsat), by cross-referencing permits and Distribution Service Orders and can ascertain Gulf Power's ability or inability to accommodate additional attachments by inspecting chronological make ready files that are kept in the ordinary order of business in an identified Engineering and Construction ("E/C") office (e.g. Panama City).

Significantly, Gulf Power has admitted that there are no instances where it was unable to accommodate an attacher (Gulf Power's "historical willingness to accommodate attachers by performing make ready" cited in *Order*), and the parties are negotiating a possible stipulation to that effect. *See Order* FCC 05M-50, released October 12, 2005, and Joint Status Report on Stipulation filed by the parties on October 26, 2005 (parties are in the process of discussing changes to Complainants' proposed stipulation). Also, in its Reply of November 9, Complainants represent that negotiations on stipulation are continuing. *Cf. Harris v. Duty Free Shoppers, Ltd.*, 940 F. 2d 1272, 1276 (9th Cir. 1991) (party's stipulation to facts forecloses further discovery on such stipulated facts). Therefore, Gulf Power is not required to provide further documents with respect to Request No. 1.

Complainants have not shown that Gulf Power has not complied with Rule 34(b). Therefore, Gulf Power need provide no further response to Request No. 8. However, the status of the stipulation will be discussed at the Status Conference of November 21, 2005. *See Order* FCC 05M-54, released November 10, 2005.

⁴ *Cf. Hagemeyer, supra* 222 F.R.D. at 597 (although there is a dispute concerning "organization of the documents at storage facility," the photographs attached to declaration refute charge of a "document dump"). Gulf Power has apparently made "*bona fide* attempts to resolve the dispute by granting access" to the documents where they are kept. *See Hagemeyer, supra* at 597.

Request No. 2

Produce, and specify by Bates number, all documents referring to the actual costs that Gulf Power has incurred annually because of Complainants' attachments (including per-pole costs and aggregate costs), as reflected in its accounting books or records of expenses, from 1998 through the present.

Complainants continue requesting documents referring to actual costs (per pole and aggregate) incurred annually related to Complainants' attachments, as costs are reflected in Gulf Power's books and records. Gulf Power objects on grounds of vagueness, and that in any event, the responsive documents to costs are the make-ready work orders that are available in the E/C offices, "or make ready is handled at the local level." Gulf Power cites as an example that Cox Cable could locate make ready work orders through permit number which would be referred to a particular file in a particular year at a particular E/C office.

But make ready work orders constitute documents of original entry. In Request No. 2, Gulf Power is not being requested to construct new accounting records; merely to produce "accounting records or records of expenses" that exist for the period 1998 to the present. Gulf Power does not represent that such books and records do not exist, or that it will be burdensome to produce such documents. These appear to be the kind of accounting books and records which are used in preparing financial statements and balance sheets that are filed with regulators (FCC, FERC, SEC). Accounting books or records with which auditors and accountants are familiar, are reliable indicators of costs that must be truthfully disclosed in reports to shareholders and regulators.⁵

Costs are relevant to the ultimate issue of whether, under *Alabama Power*, Gulf Power is entitled to charge above marginal costs. Accounting costs as recorded in corporate books and records are relevant for discovery purposes. 47 C.F.R. § 1.325 (discovery and production of documents). Books and records entries that reflect costs are uniquely within the knowledge of Gulf Power and its agents, and therefore, the Rule 34(b) alternatives do not apply to this request. Also, in the course of trial preparation, the parties must continue to discuss methods of proof that will facilitate showing relevant costs. Preferably, costs (per pole and aggregate) will be presented at hearing in charts or other demonstrative forms that are stipulated to and/or prepared by a "neutral" auditor.

⁵ In examining books and records, Complainants may have the need for access to underlying documents which may include make ready work orders and permits. Those records must continue to be made available at Gulf Power's E/C offices, while Complainants examine accounting books or records. It is expected that relevant costs as reflected in Gulf Power's books and records and records of initial entry (e.g. make ready, change out, permit) will be presented at the hearing in stipulated chart form.

In its Reply pleading, Complainants assert that Request No. 2 is not confined to costs of make ready work, but includes costs of attachment or maintenance for which Gulf Power "has not been compensated." Usually, uncollected billings are contained in a company's books and records and, if not collected, are written off for tax purposes. If "unreimbursed costs" are included, records of original entry must be specified/identified and made available for inspection before cumulative evidence of such costs is presented at the hearing. This is another area for an efficient stipulation of fact.

The subject of "accounting books or records" was discussed during an informal telephone conference on November 9, and a full status report is due on December 9, 2005. *See Order FCC 05M-53*, released November 10, 2005. Gulf Power is presently in compliance with responding to Request No. 2, and shall report on progress at the Status Conference set for November 21, 2005.

Requests Nos. 4, 5, 6 and 7

4. Produce, and specify by Bates number, all documents referring to Gulf Power poles that have been changed out from 1998 to the present at Complainants' request, including documents referring to compensation received by Gulf Power from Complainants for such change-outs.
5. Produce, and specify by Bates number, all documents referring to Gulf Power poles containing Complainants' attachments that have been changed out from 1998 to the present at the request of cable television attachers other than Complainants, including documents referring to compensation received by Gulf Power from such entities for such change-outs.
6. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at Complainants' request on Gulf Power poles from 1998 to the present, including documents referring to compensation received by Gulf Power from Complainants for such make-ready work.
7. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at the request of cable television attachers other than Complainants on Gulf Power poles containing Complainants' attachments from 1998 to the present, including documents referring to compensation received by Gulf Power from such cable television attachers for such make-ready work.

Complainants continue requesting documents referring to four categories of locally generated work related documents: (a) documents relating to poles changed out as requested by Complainants, including related compensation from Complainants; (b) change out documents relating to poles carrying Complainants attachments but assigned to CATVs other than Complainants; (c) make ready documents pertaining to all

attachers; (d) make ready documents pertaining to poles on which Complainants have attachments. Gulf Power has made available responsive documents that were and are proffered at E/C offices.

In the *Second Discovery Order*, Gulf Power was required to produce the documents in accordance with FRCP. In compliance, Gulf Power represents that responsive documents are maintained at local offices in the manner kept in the usual course of business in accordance with FRCP 34(b). But Complainants continue to argue in the Reply pleading that Gulf Power still has failed to "specify any particular documents." Complainants now ask for a ruling precluding any use of the requested documents as evidence in support of Gulf Power's claim. But, Complainants make no showing that documents are being made available by Gulf Power in a manner that does not accord with Gulf Power's usual course of business.

Complainants argue that case authorities have required producing parties to indicate boxes of documents that are "clearly labeled," or that "point to" the document(s) that "provide the information requested." *Hagemeyer N. America, Inc. v. Gateway Data Sciences Corp.*, 22 F.R.D. 594 (E.D. Wis. 2004), and *Doe v. District of Columbia*, 231 F.R.D. 27 (D.D.C. 2005), also cited by Gulf Power. But those cases decided on case-specific facts and circumstances, actually hold that a responding party need not "label or point to documents" that are presented for examination in the manner that they are kept in the ordinary course of business.

The parties must continue to negotiate the manner of document description/direction needed to facilitate a document inspection. Any impasse will be ruled on at the Status Conference set for November 21, 2005, and subject to discussion on November 21, Gulf Power will not be required at this time to further supplement its responses to Requests Nos. 4, 5, 6 and 7.

Request No. 8

Produce, and specify by Bates number, all documents referring to Gulf Power's upgrades, modernization, strengthening, or replacements of poles containing Complainants' attachments from 1998 through the present, including documents referring to money Gulf Power obtained to pay for such upgrades, modernization, strengthening, or replacements.

Complainants continue requesting documents referring to "upgrades, modernization, strengthening or replacements" of poles containing Complainants' attachments, including records of payments for the services. Gulf Power was directed to produce responsive documents in accordance with FRCP. Gulf Power responds that responsive documents were and are available at Gulf Power's E/C offices in the manner that such records are kept in the usual course of business, and contends such production is sufficient under FRCP 34(b).

In their Reply pleading, Complainants do not address the merits of Gulf Power's responses to Requests Nos. 8, 14 and 15. These requests were addressed in the *Second Discovery Order* and Gulf Power requested reconsideration. *See Order* FCC 05M-50, released October 12, 2005. Complainants note that as a result of that October 12 ruling, a responsive stipulation is currently being negotiated (No. 8); Gulf Power is now precluded from using pole availability or pole acquisition costs to justify a higher rate (No. 14); and "full capacity"/"crowded" poles will be identified on Gulf Power maps produced in discovery (No. 15). *See* Complainants' Reply to Gulf Power's Response to Complainants' Third Motion to Compel at 2 n. 1.

A responsive stipulation is being negotiated. At this time, Gulf Power will not be required to further supplement its response to Request No. 8. The status of stipulation negotiations will be discussed at the Status Conference set for November 21, 2005.

Request No. 12

In light of the Presiding Judge's ruling that "this hearing is limited to 'reasonable compensation' from rates charged for Complainants' CATV attachments" and his order excluding as irrelevant evidence "relating to non-CATV attachments," produce, and specify by Bates number, all documents which Gulf Power relied or relies upon in making its contention, in its Description of Evidence, that there is an "unregulated market for pole space," to the extent that that contention applies to CATV attachments.

Complainants continue to seek documents relied on by Gulf Power in submitting its predesignation Declaration of Evidence, wherein it was asserted that there exists an "unregulated market for pole space." Gulf Power was ordered to identify documents which are relevant and probative of such an "unregulated market." In supplemental answers, Gulf Power states that it tendered responsive documents at its local E/C offices. In its original response, Gulf Power identified responsive documents as "attachment agreements and billing information" for attachers paying more than Complainants; specified that the documents are within Bates numbers 00826 to 2309; and stated that other responsive documents were made available at the May 27-28 document review. A "cart of documents" that was made available on the first floor conference room of Gulf Power's headquarters, are represented as being organized by attacher, and contain agreements, permits and billing information. There is no convincing showing made by Complainants to refute this.⁶

If Gulf Power intends to offer proof of an "unregulated market for pole space," based on documents or other evidence existing at the time of its Description of Evidence, Gulf Power must now identify documents responsive to Request No. 12. A broad

⁶ There should be some further description of the "cart of documents" provided at the November 21 Status Conference. *Id.*

reference to the May 27-28 document production is not sufficient proof of an asserted "unregulated market." Specific documents must be identified, such as those identified with Bates numbers 00826-2309, including documents that will be relied upon by Gulf Power by employees and/or agents expected to be deposed and/or expected to testify.

Gulf Power continues to argue compliance in that it has "identified the Bates range within which the responsive documents are located. Gulf Power argues relevancy of an "unregulated market" of potential users waiting in the wings as relevant "lost opportunities". Gulf Power knows (or should know) which of these 1,483 documents it relies on to prove an "unregulated market." Yet as of this date, Gulf Power has not identified specific documents probative of an "unregulated market." There is no notice or other purpose served in having Complainants effectively guess the documents which Gulf Power has in mind.

Gulf Power must identify the specific Bates numbered documents on which it relies as evidence of an "unregulated market for pole space."⁷ Such identification must be submitted, exchanged and filed by December 9, 2005. *See Order FCC 05M-53*, released November 10, 2005.

Request No. 14

Produce, and specify by Bates number, all documents referring to sources (i.e., Gulf Power's own inventory, the inventories of LECs with whom Gulf Power has joint use agreements, or other, third-party suppliers) from which Gulf Power has obtained new poles, from 1998 through the present, in order to change-out poles containing Complainants' attachments.

Complainants continue to seek documents identifying sources of new poles which could accommodate change outs. Gulf Power objected on grounds of relevance and did not supplement its response. Gulf Power agreed in a motion for reconsideration that market conditions of pole availability was not an issue, and that Gulf Power is not impeded or limited by pole availability with respect to expanding pole capacity. In light of Gulf Power's admission, there will be no need to receive evidence at hearing on the question of pole availability. *See Order FCC 05M-50*, released October 12, 2005 at 3. Therefore, Gulf Power is not required to produce any documents in connection with further responding to Request No. 14.

⁷ Gulf Power is correct that it does not have to make a positive showing or give reasons in discovery that the identified documents being produced are relevant to an "unregulated market for pole space." If Gulf Power has nothing more to produce, it need only specify which of the Bates numbered documents are relied upon by Gulf Power for showing the "unregulated market."

Request No. 15

Produce, and specify by Bates number, all documents, including maps, diagrams, or schematics, which existed prior to Gulf Power's retention of its consultant Osmose in February 2005, that depict the specific Gulf Power poles containing Complainants' attachments that Gulf Power contends were or have been at "full capacity."

Complainants continue to seek Gulf Power maps, diagrams and schematics depicting "full capacity" poles holding Complainants' attachments, which existed before retaining consult Osmose. Gulf Power does not address this request in its Response. Gulf Power earlier objected on grounds of relevance; represented that the documents were made available at the May 27-28 document review; and apparently, Gulf Power later identified maps within the 1966 and 2001 pole count documents. But Gulf Power represented that none of the Gulf Power maps identify specific poles at "full capacity."

The Presiding Judge considered Gulf Power arguments against complying with a direction (issued under APA authority to regulate course of hearing) that requires Gulf Power to indicate in a manner using circles or color code to identify which of the poles on Gulf Power's the maps are at "full capacity" or "crowded." *See Order FCC 05M-50 supra* at 4. Gulf Power was even given discretion to design the format of its response, which will be non-binding for present purposes.⁸ *Id.* However, for each pole identified as being at "full capacity" and/or "crowded," Gulf Power must provide supporting documentation, or specify and/or identify such documentation in accord with FRCP 34. *Id.*

On November 5, 2005, Gulf Power filed a Motion for Additional Time to Comply with Order on Gulf Power's Motion to Reconsider, in order to be able to provide a "method of depicting poles holding Complainants' CATV cable attachments identifying those poles that Gulf Power contends are at full capacity." *See Second Discovery Order* at 4 and *Order FCC 05M-50, supra*. During the informal telephone conference of November 9, Gulf Power agreed that a compliance date of December 9, 2005, would provide sufficient time to respond to Request No. 15.

Gulf Power is authorized to file its response to Request No. 15 by December 9, 2005. *See Order FCC 05M-53*, released November 10, 2005.

⁸ It is expected that prior to the hearing, the parties will have agreed to a demonstrative chart or other summarized method of depicting all poles which Gulf Power intends to prove are at "full capacity" and/or are "crowded." This pole designation in response to Request No. 15 may also serve as a basis for estimating the universe of "full capacity"/"crowded" poles by a method of extrapolation that would be offered by Gulf Power, the party with the burden of proof.

INTERROGATORIES

There are five (5) interrogatories which have been responded to by Gulf Power but which Complainants, in its Third Motion to Compel, contend are still insufficient answers. (Interrogatories Nos. 8, 20, 34, 35 and 46.)

FRCP 33(d) is applicable to Gulf Power's interrogatory answers. There are two components of FRCP 33(d) for compliance by reference to records:

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts or summaries.

A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

FRCP 33(d) was "intended to be used for responding to interrogatories making broad inquires thereby requiring that numerous documents be consulted to ascertain facts, e.g. identities, quantities, data, action, tests. *See SEC v. Elfindapan*, 206 F.R.D. 574 (M.D. N.C. 2002). In such situations, FRCP requires that the specification of documents be "in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." *See Nagele v. Elec. Data Sys. Corp.*, 193 F.R.D. 94, 108 (W.D. N.Y. 2000) (responding party may refer requesting party to business records produced to the requesting party where the burden of gleaning the information sought is 'substantially the same' for both parties"). Gulf Power argues in its Response that its second supplemental responses to Complainants' interrogatories that remain in contention are in compliance with FRCP 33(d), and that Gulf Power should not be required to respond further.

Interrogatory No. 8

Complainants seek the identity of Gulf Power's poles having non-Complainant attachments, and the number of such attachments on each pole. The interrogatory further asks when such attachments were made; where the poles are located; and the amounts of compensation related to such attachments.

Gulf Power has generically identified responsive internal business documents that it asserts will provide information to include: permits organized by attacher; attachment agreements that identify attacher and geographic locations; and make ready work orders that provide compensation data. Specifically, in its Response, Gulf Power represented that it has directed Complainants to "pole attachment permits, which were produced in folders labeled by attacher;" to "the description of geographic scope at the end of each attachment agreement;" and to "make ready orders prepared at complainants' request, which state the cost of requested make ready."

Gulf Power further responded that individual CATVs can locate relevant poles in designated file drawers, and that permit logs were provided (Bates numbered) through which can be located distribution service orders and permits which also would disclose make ready work and costs.

Gulf Power has provided the availability of responsive documents and instructions on its document system. Complainants are CATV attachers and are expected to understand procedures utilized for attaching CATV to Gulf Power's utility poles. Gulf Power also explained how to "navigate" its record system of permits and make ready orders. To show when attachments were connected, Complainants were directed by Gulf Power to pole attachment permits that were produced for inspection in folders labeled by attacher. For locations, Complainants were directed to attachment agreements which contain descriptions of geographic scope and which refer to make ready orders which provide costs of requested make ready services.

Compliance under FRCP 33(d) appears reasonable and Gulf Power should not be required to provide any further answer to Interrogatory No. 8. However, Gulf Power must be prepared to further explain and/or clarify its position on compliance with Interrogatory No. 8 at the Status Conference set for November 21, 2005.

Interrogatory No. 20

Complainants seek as to each CATV Compliant party, the number of Gulf Power's poles that were changed out to accommodate attachments; relevant locations; reasons for change outs; and specification of instances when Gulf Power was not compensated.

Gulf Power was ordered to supplement its answer with the number of change outs, locations and reasons for any non-reimbursements. *See Second Discovery Order* at 7. Gulf Power refers Complainants to make ready orders which can be found by cross referencing permit logs; chronologically organized numbers that relate to make ready orders; and all documents that are kept in Gulf Power's E/C offices. Finally, Gulf Power has taken the ultimate position that "all poles which required make ready before complainants could attach were at full capacity."

Complainants have not made a showing that the documents to which they are directed by Gulf Power failed to provide the information sought, or could not be reasonably located as tendered by Gulf Power. Gulf Power argues that it has made reasonable compliance and should not be required to provide any further answer to Interrogatory No. 20.

Gulf Power is not required to provide additional answers, but must be prepared to further explain and/or clarify its position on compliance at the Status Conference set for November 21, 2005.

Interrogatory No. 34

Complainants ask whether Gulf Power routinely informs attachers and prospective attachers when pole space is reserved for "core electricity operations." Gulf Power answered generally in the affirmative, but provided few specifics.

Gulf Power was ordered to provide a supplemental answer if responsive information was reasonably obtainable and retrievable. Gulf Power also was ordered to identify specific instances of advising CATV attachers of reserved space, and conditions for such reserved space. *See Second Discovery Order* at 7. In response, Gulf Power referenced "spec plates" attached to agreements that designate electric supply space on each pole, and further explained that such "spec plate" reference is its only written notification of reserved space." (Complainants describe "spec plates" as generic forms of drawings that show electric supply space on poles.) Gulf Power has stated its final position on reserved space for internal usage, and will not be permitted to offer evidence at the hearing beyond its answers to Interrogatory No. 34.

For purposes of discovery in this proceeding, Gulf Power seems to have complied reasonably and will not be required to provide any further answer to Interrogatory No. 34. But Gulf Power must be prepared to further explain and/or clarify its answer to Interrogatory No. 34, and particularly the complete meaning of its reference to "spec plates," at the Status Conference set for November 21, 2005.

Interrogatory No. 35

Complainants seek further identifying information about reserved space on poles that are currently occupied by Complainants. Gulf Power responded that "it does not treat further space needs on a pole by pole basis."

Complainants sought the identity of any "re-take space" actually occupied by Complainants, and that any such "re-take space" must be "justified" to show a "higher valued use." Complainants also demanded concession of any reserved or re-taken space ("concede the point") where there is no *bona fide* showing of need. Gulf Power answered that it cannot identify specific needs to reserve space. Gulf Power stated that its practice has been to permit attachers to pay the cost of modifications needed to maintain attachments, "thereby vitiating any claim that Gulf Power is ever deprived of the opportunity to put space on its poles to a higher reduced use of its own." (See Gulf Power answers.) Based on its own admissions, Gulf Power may not offer evidence beyond its answers to Interrogatory No. 35.

Complainants do not address the answers to Interrogatory No. 35 in their Reply pleading. Therefore, Complainants no longer contest the information provided by Gulf Power under Interrogatory No. 35.⁹ Gulf Power will not be required to provide any further answer to Interrogatory No. 35.

Interrogatory No. 46

Complainants seek identity and amounts of pole rental rates paid by Gulf Power to other joint user pole owners for leased space, the amount of pole space leased by such joint users, and disclosure and explanation of methodologies of related rate calculations.

Gulf Power was ordered to provide further information on rates and rate methodologies. Gulf Power answered that it pays the same rate as other owners, and refers Complainants to descriptions in joint use agreements, citing specific examples by document and Bates page number and deposition exhibit. Gulf Power referenced three (3) pole attachment agreements by way of illustration which refer to "adjustment rates" but without explanation of methodology. Complainants contend that these three specimen agreements are insufficient for responding to Interrogatory No. 46. Complainants state continued dissatisfaction with deposition explanations and quantifications, citing the difficulty in scheduling additional clarifying witnesses. But scheduling of depositions

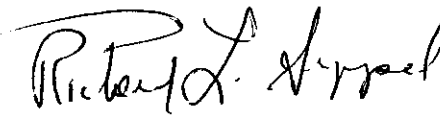
⁹ Complainants noted in Reply that upon re-examination of the *Second Discovery Order*, *supra* at 8, Complainants are now satisfied that Gulf Power will be precluded from offering evidence regarding "need" by Gulf Power to reserve for itself any poles occupied by Complainants.

does not require additional answers to an interrogatory question. Gulf Power is responsible for providing testimony at hearing which is complete and credible and will not be permitted to testify or offer proof that exceeds its response to Interrogatory No. 46.

It appears that Gulf Power has complied reasonably in answering Interrogatory No. 46. But Gulf Power must be prepared at the Status Conference set for November 21 to explain and/or clarify its answer to Interrogatory No. 46, and particularly explain and/or clarify the limitation of three Agreements and the presence or absence of the requested "methodology."

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION¹⁰

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" and last name "Sippel" clearly legible.

Richard L. Sippel
Chief Administrative Law Judge

¹⁰ Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.